No. 3964

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ADELAIDE McCOLGAN, as administratrix with the will annexed of the estate of Daniel A. McColgan, and R. McCOLGAN,

Appellants,

vs.

FREDERICK V. LINEKER and FREDERICK V. LINEKER, as administrator of the estate of Norvena Lineker, deceased, the plaintiffs in a suit pending in the Southern Division of the United States District Court for the Northern District of California, Second Division (Number 506 in Equity on the Records of said Court), and R. S. MARSHALL, OLIVE H. MARSHALL, MARY J. DILLON, (formerly Mary L. Tynan) EUSTACE CULLINAN, E. C. PECK, T. K. BEARD, GRACE A. BEARD, UNION SAVINGS BANK OF MODESTO and STANISLAUS LAND AND ABSTRACT COMPANY,

Appellees.

BRIEF FOR APPELLANTS.

ALFRED J. HARWOOD,
Attorney for Appellants.

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BRIEF FOR APPELLANTS.

Statement of the Case.

This is an appeal by the appellants, Adelaide McColgan, as administratrix with the will annexed

of the estate of Daniel A. McColgan, and R. McColgan, from a judgment and order of the District Court denying appellants' motions for the designation of a judge other than the Honorable William C. Van Fleet, which motions were made in pursuance of Sections 20 and 21 of the Judicial Code.

The suit is brought by the plaintiffs against these appellants, and other defendants, to set aside, on the grounds of alleged fraud, a deed of trust made to R. McColgan and Eustace Cullinan, as trustees, and also to set aside on the same ground a sale made by said trustees to defendant, E. C. Peck, pursuant to said deed of trust. The bill of complaint also seeks an accounting from the defendants Daniel A. McColgan (now represented by the appellant Adelaide McColgan, as administratrix) and R. McColgan. All of the material averments of the bill of complaint are put in issue by the answer of the defendants Daniel A. McColgan and R. McColgan. (Tr. pgs. 2, 26.)

The appellants filed separate affidavits, averring that Honorable William V. Van Fleet had a personal bias or prejudice against them and in favor of the plaintiff, Norvena Lineker. The affidavits were accompanied by the certificates of counsel of record that the affidavits and applications for the designation of another judge were made in good faith. (Tr. pgs. 140, 152.)

The plaintiff, Fred V. Lineker filed a so-called counter-affidavit which the court permitted to be

received over the objection of these appellants. (Tr. pg. 170.)

The motions were submitted to the court for its decision upon the affidavits of these appellants, and the counter-affidavit of the plaintiff Fred V. Lineker, and were denied by the court.

Specifications of Error.

On this appeal the appellants rely upon and intend to urge, the following errors which they assert were committed by the District Court, viz:

1. That the District Court and the judge thereof erred in denying appellants' motions to designate another judge, which motions were based on affidavits filed in pursuance of Section 21 of the Judicial Code.

2. That the District Court and the judge thereof erred in denying said motions and in holding that said affidavits did not sufficiently show bias and prejudice.

3. That the District Court and the judge thereof erred in holding and deciding that the said affidavits were not filed in time and in holding and deciding that the cause shown by appellants for not filing said affidavits prior to March 16, 1922, was insufficient.

4. That the District Court and the judge thereof erred in permitting the counter-affidavit

of the plaintiff Fred V. Lineker to be read at the hearing.

Brief of the Argument.

On this appeal the appellants maintain that the court erred in denying their motions for the designation of another judge. The argument will be made under two heads, viz:

1. The affidavits averring bias and prejudice were sufficient under Section 21 of the Judicial Code.

2. The cause shown by appellants as to why the affidavits were not filed before March 16, 1922, was sufficient under Section 21 of the Judicial Code.

The appellants also maintain that the court erred in permitting the counter-affidavit of the plaintiff to be read at the hearing.

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1. THE AFFIDAVITS AVERRING BIAS AND PREJUDICE WERE SUFFICIENT UNDER SECTION 21 OF THE JUDICIAL CODE.

The affidavits were filed and the motions made in pursuance of Section 21 of the Judicial Code which reads as follows:

> "(Jud. Code, Sec. 21). *Affidavit of Personal Bias or Prejudice of Judge.* Whenever a party to an action or proceeding, civil or criminal, shall make and file an affidavit that the judge before whom the action or proceeding is to be

tried or heard has a personal bias or prejudice, either against him or in favor of any opposite party to the suit, such judge shall proceed no further therein, but another judge shall be designated in the manner prescribed in the section last preceding, or chosen in the manner prescribed in Section 23 to hear such matter. Every such affidavit shall state the facts and the reasons for the belief that such bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term of the court, or good cause shall be shown for the failure to file it within such time. No party shall be entitled in any cause to file more than one such affidavit; and no such affidavit shall be filed unless accompanied by a certificate of counsel of record that such affidavit and application are made in good faith. The same proceedings shall be had when the presiding judge shall file with the clerk of the court a certificate that he deems himself unable for any reason to preside with absolute impartiality in the pending suit or action."

The affidavit of the defendant Adelaide McColgan is as follows:

"City and County of San Francisco,
State of California,
Northern District of California,—ss.

Adelaide McColgan, being first duly sworn, deposes and says: That she is one of the defendants in the above-entitled action or suit; that af-

fiant is the administratrix with the will annexed of the estate of Daniel A. McColgan, deceased, and as such administratrix is one of the defendants in said action or suit; that the above-entitled action or suit was commenced during the lifetime of said Daniel A. McColgan and that said Daniel A. McColgan died on May 12th, 1921, and since the filing of the bill of complaint in the office of the Clerk of the above-entitled court; that by an order of the above-entitled court, affiant as the administratrix with the will annexed of the estate of Daniel A. McColgan, deceased, was substituted in the place and stead of said Daniel A. McColgan, deceased; that Honorable William C. Van Fleet, before whom the above-entitled action is to be tried, has a personal bias or prejudice against affiant and in favor of the plaintiff Norvena Lineker; that said Honorable William C. Van Fleet has a personal prejudice against affiant, *that said Honorable William C. Van Fleet has a personal bias against affiant;* that said Honorable William C. Van Fleet has a personal bias in favor of the above-named plaintiff Norvena Lineker; that the facts and the reasons for the belief of affiant that such bias and prejudice exists are as follows: That in the month of October, in the year 1919, there was tried before said Honorable William C. Van Fleet, sitting as Judge of the above-entitled court, an action at law in which the plaintiffs herein were plaintiffs

and Mary J. Dillon and Thomas B. Dillon were defendants; that neither Daniel A. McColgan nor the defendant R. McColgan, nor any of the defendants herein, other than Mary J. Dillon, were parties or privies to said action at law; that said Daniel A. McColgan was a witness in said action at law and gave testimony at the trial thereof; that the trial of the above-entitled action (viz., the action or suit of Norvena Lineker, et al., against R. S. Marshall, et al.), was commenced in the above-entitled court before said Honorable William C. Van Fleet on the 20th day of January, 1922; that when said trial began the defendants asked permission of the Court to introduce evidence in support of the defendants' pleas of former adjudications of the controversy involved in the above-entitled action before the plaintiffs should be permitted to offer evidence in support of the allegations of the bill of complaint; that such permission was granted by the court, and the defendants thereupon introduced in evidence the judgment and judgment roll in an action pending in the Superior Court of the State of California, in and for the County of Stanislaus, entitled Frederick V. Lineker, plaintiff, against Daniel A. McColgan, R. McColgan Eustace Cullinan, R. S. Marshall and Olive H. Marshall, his wife, defendants, and the judgment and judgment roll in an action pending in said Superior Court entitled R. S. Marshall and

Olive H. Marshall, plaintiffs, against Daniel A. McColgan, R. McColgan, and Eustace Cullinan, defendants; that pursuant to such permission the defendants also introduced in evidence the *remittitur* of the District Court of Appeal, for the Third Appellate District, affirming the judgment in said first mentioned action and also introduced in evidence certain briefs filed in said action in the said Superior Court and in the said District Court of Appeal; that the foregoing was all the evidence introduced by any of the parties to this action; that after the introduction of such evidence in support of said pleas of former adjudications, counsel for defendants and counsel for plaintiffs argued the question of law as to whether such judgment supported said pleas of former adjudications; that said argument was made on the 24th day of January, 1922; that at the conclusion of said argument and on said 24th day of January, 1922, said Honorable William C. Van Fleet made the following statements from the bench, viz.:

'The COURT.—I am satisfied from the impression made upon my mind by this argument, to which I have listened with a great deal of interest, that I would not be justified in proceeding at this time to the trial of the case on the merits. I want to examine this question for myself in the light of the authorities and in the light of the pleadings in the former cases, in the State Court; but I am very strongly impressed with

the fact that the contention is well taken. Mr. Taugher, I have heard you through now?

Mr. TAUGHER.—I was going to ask you a question.

The COURT.—Ask the question. What is it?

Mr. TAUGHER.—I was going to say, if your Honor would like to have them, that there are various points upon which I can supply authorities if your Honor would give me permission.

The COURT.—Oh, you ought to know that I never decide anything blindly when I can have information from either side. But the question, the principles involved in the doctrine of *res adjudicata* are very well settled and they do not proceed along the narrow lines that it seems to me counsel for plaintiffs would be inclined to desire to confine them. It is not a question of whether or not in all of its refinements the same precise matters have been litigated in their fullness in one case,—if they occur in another case and if the essential principles involved in the case at hand has in another action been adjudicated and under pleadings where the same substantive grounds may have or might have been adjudicated, although even not in their fullness, yet if the party had the opportunity in an action involving the same substantive rights to have those facts adjudicated and the judgment is in fact adjudicated on principles there presented, he cannot have another

day in court to re-litigate those fundamental principles.

Mr. TAUGHER.—Yes.

The COURT.—Now then, I am only suggesting this, of course, in a tentative way, because I am fully satisfied myself that this defense is not well taken, and I will be perfectly frank to say, because I have become so familiar with the facts underlying this whole transaction with reference to this woman's property, that it is a stench in the nostrils of any honest man, the manner in which this woman's property was taken from her originally. It was little less than downright robbery. And I have stated it before in the presence of those who are responsible, and I again insist upon it, that the evidence that they may have given in the past in courts of justice under certain circumstances, does not change my attitude at all, because in the case of Mrs. Lineker against Dillon and in the subsequent contempt proceedings the entire facts of this entire transaction were developed to me in such a way as to leave no room for doubt as to the conclusion which should be based upon them; and therefore I desire if possible to reach the merits of this controversy. The character in which that occurred was brought out, was well illustrated, well evidenced upon the stand by one of the McColgans—I don't know whether it is the one that is still alive or the one that is dead—

Mr. TAUGHER.—He is dead.

The COURT.—Where he voluntraily made the suggestion that he felt—I don't remember exactly how he expressed it—but undoubtedly it was on his conscience that he had felt that perhaps there was something coming to Mrs. Lineker and that he had had that in mind to come to a settlement with her, although he said he had not.

Mr. TAUGHER.—Yes, your Honor—offered settlement with her for several thousand dollars.

The COURT.—Yes, I have forgotten. But underlying that declaration, which was forced from him undoubtedly by his conscience, was this history of a state of facts that should make any honest man blush. Therefore I say that if I can get away from this technical objection—technical in the sense that it does not involve the merits—I shall do so; but I frankly say to you now that I cannot see my way clear upon the presentation that has been had here, and it has been a very thorough one, of avoiding the objection that has been made here.

Mr. TAUGHER.—May we make a suggestion?

The COURT.—Mr. Taugher, what is your suggestion? I don't like to be interrupted or to be bombarded with questions after I have given my ruling.

Mr. TAUGHER.—Pardon me.

The COURT.—What is it you wish to suggest?

Mr. TAUGHER.—I was going to say that if after your Honor reads those pleadings and you are still not satisfied, if your Honor will give me permission then to write a little brief on the matter I will be glad to do it.

The COURT.—I don't believe for a moment, with the presentation that has been made here, that there will be any room for any further light to be cast upon it by counsel. I just want to look at these pleadings for myself and I believe that with my experience in the construction of pleadings that I will be just as well satisfied with my own construction as I would with the construction of counsel, when I decide. But, as I say, I am satisfied that I would not feel justified to go on with the merits of this case until this question has been definitely settled, because of my very strong view that it would not be possible to do so with the strong conviction I now have that the judgment—that the defense will have to be sustained. Now, of course, counsel at the bar is not responsible for this; I don't know who has been responsible; but this woman's rights have been butchered in the past, and in my judgment she had a fine property there and it has been gotten away from her. Happily for her she was enabled, through the efforts of one of the counsel in this case, to recover a very considerable quantity of her property that had been or its equavalent, taken from her. But that

this property to-day is worth a great *deal than* has been recovered back to her I do not doubt.

Mr. Taugher.—Worth a hundred thousand dollars.

Mr. Partridge.—What nonsense.

The Court.—I will continue the case on the merits until I have been able to examine those questions for myself, with the hope, as I say, that I may be able to avoid this defense, but with the fear that I shall not be able to.

Mr. Harwood.—Has your Honor any objection to my handing you a memorandum on that matter containing the authorities?

The Court.—No, sir, I don't wish any memorandum. I do not wish you to be heard in any further way than you have been.

Mr. Harwood.—I have handed counsel here this.

The Court.—Well, hand it to the clerk—are you asking to file something?

Mr. Harwood.—No, that is the only idea I had.

The Court.—Oh, yes, I am willing for you to offer anything that has been presented here.

Mr. Taugher.—I did not file any authorities. If you care to have me I will do so.

The Court.—I think it might be well to have this argument written out. Have you been taking down this whole thing (Addressing the Reporter)?

The Reporter.—Yes, and with the assistance of the documents and pleadings I can transcribe it.

The Court.—I don't care anything about that. Give me the citations. The case on the merits is continued indefinitely until I have had opportunity to go into this matter. Is there anything else. This stands submitted on the feature of the defense, the question of *res adjudicata.'*

That the foregoing statements made by said Honorable William C. Van Fleet were taken down in shorthand by the official stenographic reporter of said court; that said Honorable William C. Van Fleet is designated in the foregoing statement by the words 'The Court'; that at the time the foregoing statements were made by said Honorable William C. Van Fleet no evidence had been offered or received in support of any of the issues in the above-entitled action except in support of the issues raised by the defendants' affirmative pleas of former adjudications; that said Honorable William C. Van Fleet believes that said Daniel A. McColgan robbed the said plaintiff Norvena Lineker and believes that said Daniel A. McColgan was a dishonest and unscrupulous man; that such belief on the part of said Honorable William C. Van Fleet is not based upon any evidence received in any action or proceeding in which said Daniel A. McColgan was a party or to which

said Daniel A. McColgan was privy, and is not based on any evidence received or introduced in the above-entitled action or suit; that if said Honorable William C. Van Fleet tries the issues of fact involved in the above-entitled action or suit, such belief on the part of said Honorable William C. Van Fleet will prevent said Honorable William C. Van Fleet from determining such issues with impartiality; that said Honorable William C. Van Fleet believes that said plaintiff Norvena Lineker was grievously wronged by said Daniel A. McColgan in the transaction described in the bill of complaint herein; that such belief on the part of said Honorable William C. Van Fleet is not based on any evidence received in any action or proceeding in which said Daniel A. McColgan was a party, or to which he was privy, and is not based on any evidence received in the above-entitled action or suit; that if said William C. Van Fleet tries the issues of fact involved in the above-entitled action or suit, such belief on his part will prevent him from determining such issues with impartiality; that said Daniel A. McColgan was not in fact dishonest or unscrupulous; that said Daniel A. McColgan never robbed, or defrauded, or took any undue advantage of said plaintiff Norvena Lineker, or of any other person; that said plaintiff Norvena Lineker was never wronged or defrauded by said Daniel A. McColgan, and that in all transactions between

said Daniel A. McColgan and said Norvena Lineker, said Daniel A. McColgan acted honestly and with good faith; that the reasons why this affidavit was not filed not less than ten days before the beginning of the term of the above-entitled court are as follows: That affiant did not at any time prior to the 24th day of January, 1922, know that said Honorable William C. Van Fleet had a personal prejudice or bias against affiant or a personal prejudice or bias in favor of said plaintiff Norvena Lineker; that on said 24th day of January, 1922, the said Honorable William C. Van Fleet ordered that the trial of the above-entitled action or suit be continued indefinitely until said Honorable William C. Van Fleet had an opportunity to determine the sufficiency of said pleas of former adjudications, and at the time of making said order, said Honorable William C. Van Fleet stated that he would try no cases at San Francisco until after the month of March as he would be engaged during the month of March in trying cases at the City of Sacramento; that the official stenographic reporter who took down the said statements of said Honorable William C. Van Fleet, as aforesaid, was not the regular stenographic reporter of said court, but was merely acting as such reporter on the 24th day of January, 1922, in the place of the regular stenographic reporter; that the stenographic reporter who took down said statements in short-

hand as aforesaid is named W. L. Flannery and is regularly employed as a stenographic reporter by the Railroad Commission of the State of California; that after the 24th day of January, 1922, Alfred J. Harwood, affiant's counsel herein, made diligent effort to communicate with said W. L. Flannery and on several occasions called at the office of the said Railroad Commission to see said W. L. Flannery, so that he would request said W. L. Flannery to transcribe his notes taken on the said 24th day of January, 1922, but affiant's said counsel was unable to make such request of said W. L. Flannery for the reason that said W. L. Flannery was at Eureka and other places in the State of California, acting as official stenographic reporter for the said Railroad Commission at hearings held at Eureka and said other places; that affiant's said counsel used reasonable diligence in making such request of said W. L. Flannery and used reasonable diligence in obtaining a transcript of the notes of said W. L. Flannery made on the 24th day of January, 1922, as aforesaid; that affiant's said counsel was unable to obtain a transcript of said notes until the last week in the month of February, 1922; that on the said 24th day of January, 1922, said Honorable William C. Van Fleet did not continue the trial of the above-entitled action or suit to any definite day or term of said court, but continued the trial thereof indefinitely; that the

time for the trial of said action or suit has not yet been set.

Wherefore, affiant, the said defendant, prays that the Honorable William C. Van Fleet proceed no further in the above-entitled action, but another Judge shall be designated in the manner prescribed in Section 20 of the Judicial Code. or chosen in the manner prescribed in Section 23 thereof, to hear such matter.

Adelaide McColgan.

Subscribed and sworn to before me this 16th day of March, 1922.

[Seal] E. J. Casey,

Notary Public in and for the City and County of San Francisco, State of California.

CERTIFICATE OF COUNSEL OF RECORD.

I, the undersigned, Alfred J. Harwood, counsel of record for the above-named defendant Adelaide McColgan, as administratrix with the will annexed of the estate of Daniel A. McColgan, deceased, do hereby certify that the foregoing affidavit and application are made in good faith.

Alfred J. Harwood,

Counsel of Record for said Defendant."

The affidavit of the defendant R. McColgan is substantially the same as the affidavit filed by the defendant Adelaide McColgan. (Tr. pg. 152.)

It is respectfully submitted that the affidavits clearly show bias and prejudice against these de-

fendants on the part of the judge. The judge has stated that the whole transaction between the defendants Daniel A. McColgan and R. McColgan and the plaintiff Norvena Lineker is a stench in the nostrils of any honest man and that it is little less than downright robbery. The judge has also stated that the entire transaction was developed before him in the action of *Lineker v. Dillon* in such a way as to leave no doubt as to the conclusion that should be based upon it. The judge has also stated that one of the McColgans in that case voluntarily made the suggestion that he felt that perhaps there was something coming to Mrs. Lineker and that he had it in his mind to come to a settlement with her, but that he had not done so. The judge has said that this statement on the part of McColgan was forced from him undoubtedly by his conscience, and that underlying that declaration was a history of a state of facts that should make any honest man blush. The judge also stated that if he could get away from the technical objection (the pleas of *res judicata*) he should do so. The judge has also stated that Mrs. Lineker's rights have been butchered and that he would examine the question as to the pleas of *res judicata* with the hope that he might be able to avoid this defense.

It is apparent that Judge Van Fleet believes that the McColgans defrauded Mrs. Lineker. *This belief is not based on any testimony taken at the trial of this suit or at any trial where the McColgans were parties or where they had their day in court,*

or where they had the right to cross-examine witnesses or to show their side of the transaction, but is based on testimony taken in a case to which the McColgans were neither parties nor privies.

In the suit the McColgans are charged with fraud and it is incumbent upon the chancellor who tries the cause to find whether or not these charges of fraud are sustained by the evidence.

It is respectfully submitted that the case of Berger v. United States, 255 *U. S.* 32, *is decisive here.* In that case the affidavit averred that the judge was prejudiced against the affiant because he was born in Austria. The affidavit quoted certain statements impugning the loyalty of Germans and German Americans that the judge had made with reference to Germans and German Americans generally. The Supreme Court held that this affidavit sufficiently complied with Section 21 of the Judicial Code.

Referring to the affidavit required by that Section, Mr. Justice McKenna said:

> "Of course the reasons and facts for the belief the litigant entertains are an essentail part of the affidavit, and must give fair support to the charge of a bent of mind that may prevent or impede impartiality of judgment. The affidavit of defendants is of that character. The facts and reasons it states are not frivolous or fanciful but substantial and formidable and they have relation to the attitude of Judge Landis' mind toward these defendants."

In the above case the Supreme Court held that when an affidavit is filed pursuant to Section 21 of

the *Judicial Code* it becomes the duty of the judge to pass upon its sufficiency under that Section, and that, if it is sufficient, he is obliged to designate another judge.

The Supreme Court further held that the averments of the affidavit could not be contradicted by other affidavits. After quoting Section 21 of the *Judicial Code,* Mr. Justice McKenna said:

> "There is no ambiguity in the declaration, and seemingly nothing upon which construction can be exerted,—nothing to qualify or temper its words or effect. It is clear in its permission and direction. It permits an affidavit of personal bias or prejudice to be filed, and upon its filing, if it be accompanied by certificate of counsel, directs an immediate cessation of action by the judge whose bias or prejudice is averred and, in his stead, the designation of another judge. And there is purpose in the conjunction; its elements are complements of each other. The exclusion of one judge is emphasized by the requirement of the designation of another.
>
> But it is said that there is modification of the absolutism of the quoted declaration in the succeeding provision that the 'affidavit shall state the facts and reasons for the belief' of the existence of the bias or prejudice. It is urged that the purpose of the requirement is to submit the reality and sufficiency of the facts to the judgment of the judge, and their support of the averment or belief of the affiant. It is in effect urged that the requirement can have no other purpose; that it is idle else, giving an automatism to the affidavit which overrides everything. But this is a misunderstanding of the requirement. It has other and less extensive use, as pointed out by Judge Meek in

> *Henry v. Speer, supra.* It is a precaution against abuse, removes the averments and belief from the irresponsibility of unsupported opinion, and adds to the certificate of counsel the supplementary aid of the penalties attached to perjury. Nor do we think that this view gives room for frivolous affidavits."

In reply to the contention of the Solicitor General that the affidavit in the *Berger* case was founded upon "opinions, beliefs, rumors or gossip" and that it was made on information and belief, Mr. Justice McKenna further said:

> "We do not know what counsel means by 'opinions, beliefs, rumors, or gossip.' The belief of a party the section makes of concern, and if opinion be nearer to or farther from persuasion than belief, both are of influence, and universally regarded as of influence, in the affairs of men, and determinative of their conduct; and it is not strange that Paragraph 21 should so regard them.
>
> We may concede that Paragraph 21 is not fulfilled by the assertion of 'rumors or gossip,' but such disparagement cannot be applied to the affidavit in this case. Its statement has definite time and place and character, and the value of averments on information and belief in the procedure of the law is recognized. To refuse their application to Paragraph 21 would be arbitrary and make its remedy unavailable in many, if not in most, cases."

Mr. Justice McKenna further said:

> "We are of opinion, therefore, that an affidavit upon information and belief satisfies the section, and that, upon its filing, if it show the objectionable inclination or disposition of the

judge, which we have said is an essential condition, it is his duty to 'proceed no further' in the case. And in this there is no serious detriment to the administration of justice, nor inconvenience worthy of mention; for of what concern is it to a judge to preside in a particular case? of what concern to other parties to have him so preside? and any serious delay of trial is avoided by the requirement that the affidavit must be filed not less than ten days before the commencement of the term.

Our interpretation of Paragraph 21 has, therefore, no deterring consequences, and we cannot relieve from its imperative conditions upon a dread or prophecy that they may be abusively used. They can only be so used by making a false affidavit; and a charge of, and the penalties of, perjury, restrain from that,—perjury in him who makes the affidavit, connivance therein of counsel, thereby subjecting him to disbarment. And upon what inducement and for what achievement? No other than trying the case by one judge rather than another, neither party nor counsel having voice or influence in the designation of that other; and the section, in its care, permits but 'one such affidavit.'

But if we concede, out of deference to judgments that we respect, a foundation for the dread, a possibility to the prophecy, we must conclude Congress was aware of them and considered that there were countervailing benefits. At any rate, we can only deal with it as it is expressed, and enforce it according to its expressions. Nor is it our function to approve or disapprove it; but we may say that its solicitude is that the tribunals of the country shall not only be impartial in the controversies submitted to them, but shall give assurance that they are impartial,—free, to use the words of the section, from any 'bias or prejudice' that

> might disturb the normal course of impartial judgment. And to accomplish this end the section withdraws from the presiding judge a decision upon the truth of the matters alleged. Its explicit declaration is that, upon the making and filing of the affidavit, the judge against whom it is directed 'shall proceed no further therein, but another judge shall be designated in the manner prescribed in Paragraph 23 to hear such matter.'
>
> And the reason is easy to divine. To commit to the judge a decision upon the truth of the facts gives chance for the evil against which the section is directed. The remedy by appeal is inadequate. It comes after the trial, and if prejudice exist, it has worked its evil, and a judgment of it in a reviewing tribunal is precarious. It goes there fortified by presumptions, and nothing can be more elusive of estimate or decision than a disposition of a mind in which there is a personal ingredient."

In the *Berger* case Judge Landis permitted to be filed a stenographic report of the remarks made by him. This stenographic report showed that the remarks actually made were essentially different from the remarks quoted in the affidavits of the defendants. In holding that the stenographic report should not be considered by the court, the Supreme Court said:

> "After overruling the motion of plaintiffs for his displacement, Judge Landis permitted to be filed a stenographic report of the incident and language upon which the motion was based. We, however, have not discussed it, because, under our interpretation of Paragraph 21, it is excluded from consideration."

Mr. Justice Day in his dissenting opinion said:

> "It does not appear that the trial Judge had any acquaintance with any of the defendants, only one of whom was of German birth, or that he had any such bias or prejudice against any of them as would prevent him from fairly and impartially conducting the trial."

With reference to the construction of Section 21 of the Judicial Code, Mr. Justice Reynolds (who also dissented) said:

> "Of course no Judge should preside if he entertains actual personal prejudice towards any party and to this obvious disqualification Congress added honestly entertained belief of such prejudice when based upon fairly adequate facts and circumstances."

The situation here is as follows: These defendants are before a court of equity charged with fraud. It is incumbent upon the chancellor to determine whether these charges of fraud are sustained by the evidence. *Before one word of evidence has been received, the chancellor states, in effect, that he believes the defendants have ben guilty of the very fraud charged against them in the plaintiffs' bill of complaint. The chancellor has stated that his belief is based upon evidence received in an action at law to which action at law these defendants are strangers. It is respectfully submitted that it would be impossible to present a more clear case of bias and prejudice and that if the statute is construed not to apply in such a case then the statute is meaningless.*

There are a number of cases (such as *State v. Bohan,* 19 Kan. 28, which hold bias and prejudice is not shown where at a former trial of a criminal case (where the jury and not the judge passes on the facts) a judge at the conclusion of the case, in sentencing the defendant, expressed himself as believing in the defendant's guilt. Such bias or prejudice (if it can be called bias or prejudice at all) may be said to be bias or prejudice in the case, for in those cases the judge has heard the evidence and the defendant has had his day in court, *and the statements made by the judge in sentencing the defendant were made in the orderly course of judicial procedure and were based on the finding of the jury.*

But, it is respectfully submitted, no case will be found which holds that a chancellor is not biased or prejudiced where the facts are at all similar to those shown in the affidavits on file herein. On the contrary, the authorities are all the other way, and in many cases it is intimated that a *very much weaker showing of bias and prejudice than is her presented would be sufficient to sustain the charge of bias and prejudice.*

Assume that in *Berger v. U. S.,* 255 U. S. 32 *supra,* the trial judge had said at a hearing on a demurrer to the indictment that he believed Berger to be disloyal. *Would not that fact more clearly show prejudice and bias than the facts stated in Berger's affidavit?* And yet such a statement made at the hearing of the demurrer might be called "prejudice in the cause." It is respectfully submitted that the

test is not whether the statements showing prejudice or bias are made in the cause in which the charge of prejudice or bias is made. The test must be: *Do the statements made by the judge, whether made in the cause or in some other case, show prejudice or bias?* Of course there is a clear and well recognized distinction between statements made by a judge after the hearing of evidence in a cause and statements made before he has heard the evidence.

It is respectfully submitted that this is a much stronger case than *Berger v. United States, supra. Here the judge passes upon the facts; there the facts were passed upon by a jury. Here the feeling on the part of the judge is directed against the defendants personally; there the feeling was against a class of which the defendant Berger was not even a member, some of the other defendants, jointly impleaded with Berger, being members of that class. Here the judge has come in contact with the defendants; there the judge was wholly unacquainted with Berger and had never come in contact with him.*

In *Massie v. Commonwealth,* 20 S. W. 704 (Ky.), the Court of Appeals of Kentucky held that an affidavit setting forth that after a former trial of a criminal case, at which trial the jury disagreed, the judge expressed his opinion of the guilt of the defendant, showed prejudice on the part of the judge.

In *Estudillo v. Security Loan Co.,* 158 Cal. 70. after the trial and judgment and pending proceedings on a motion for a new trial, the party against

whom the judgment was rendered filed an affidavit of bias and prejudice under Section 170 of the Code of Civil Procedure. Referring to the affidavit, the Supreme Court said:

> "We do not deem it necessary to set forth the averments of the affidavits upon which plaintiffs relied to support this motion. If they contained any statements tending to show bias on the part of the judge, these statements were fully met by counter affidavits. The finding of the trial judge on conflicting affidavits is conclusive on appeal, even though the question in controversy be the disqualification of the judge himself. (Swan v. Talbot, 152 Cal. 142 (94 Pac. 238).) The uncontradicted matter consisted merely of a recital of the proceedings prior to and during the trial, in the course of which Judge Oster made a number of rulings adversely to the plaintiff's contentions. We are not prepared to concede that all or any of these rulings were erroneous. But if it be assumed that in each of them the trial court committed error, that fact alone would not be sufficient to show bias on his part. *The record is devoid of the slightest indication that Judge Oster had any relations, outside of the trial, with any of the parties, that he entertained any feelings of hostility or friendship toward any of them, or that he had, except in the course of orderly judicial procedure, given utterance to any expressions concerning the merits of the case.*"

Here is a direct intimation that had the judge had any relations with either of the parties, outside of the trial, or had he, other than in the course of orderly judicial procedure, given utterance to any

expressions concerning the merits of the case, there would have been a sufficient showing.

In the case at bar the judge came in contact with the plaintiff Norvena Lineker and the McColgans outside of the trial, and he has expressed himself on the merits of the instant case without hearing the evidence.

In *People v. Findley,* 132 Cal. 304, the defendant's affidavit stated that the judge, at a former trial, had stated that he had no doubt as to the defendant's sanity. Referring to this affidavit the Supreme Court said:

> "Insanity being set up as a defense, if the judge had wantonly, and without any occasion for it, announced in the presence of the jury that he had never had any doubt as to the defendant's sanity, this might indicate that he was not disposed to give the defendant a fair trial; but the affidavit does not give us the full proceedings in reference to this matter; it does not state what was said by defendant's counsel, in his opening statement or elsewhere, to call forth any remark from the court as to the sanity of defendant. The exact language of court and counsel was undoubtedly taken down by the court reporter at the time, and this, or its substance, should have been presented at the hearing of the motion. In the absence of a showing to that effect, it will not be presumed that the court made the remark without any call for it. The only proper occasion, that occurs to us, that the court would have to announce that he never had any doubt as to defendant's sanity would be in response to a suggestion on the part of defendant's attorney that his client was then insane, and a demand that the question of his

> then present sanity be tried before a jury called specially for that purpose, in accordance with the provisions of section 1368 of the Penal Code. It would be no evidence of prejudice in the judge, for him to declare, in response to a demand of this nature, that he had no doubt as to the sanity of defendant; and if counsel desired that the declaration should not be made in the presence of the jury, he should not call for the ruling in their presence, but should request the court to direct them to retire."

In *McEwen v. Occidental Life Ins. Co.,* 172 Cal. 6, 10, the affidavit stated that at a former trial of the case the judge had made the following statement:

> "I will entertain a motion for a new trial upon the minutes of the Court at any convenient time. I do not see how the Jury could possibly have reached this verdict."

In this case the judge (pursuant to the California law) filed an affidavit disclaiming bias and prejudice. The Supreme Court said:

> "This affidavit (the Judge's affidavit) was, in itself, sufficient to overcome the very meager showing made by the plaintiff in her effort to establish prejudice on the part of the judge. It makes little difference, therefore, whether Mr. Thompson's affidavit was, strictly speaking, admissible or not.
>
> "Plaintiff's affidavit shows that after ruling against her in the first trial Judge Wood granted her motion for a new trial; that an appeal was taken by her opponent; and that she prevailed over that opponent in the court of appeal. We fail to see how these facts indicated any bias or prejudice on the part of the judge. On the contrary, they evidenced a desire to do

justice which caused the judge frankly to admit that his ruling in granting the nonsuit was incorrect. Next we find that the plaintiff feared she would not be fairly treated on the second trial; but her state of mind is not evidence. She complains that the judge generally decided against her on objections made by her counsel but she does not show, nor even assert, that such rulings were not generally justified. Three of the four rulings of which she makes specific complaint seem to have been reversed by the court of its own motion. We refer to those by which the privileged communications made by deceased to three physicians were first admitted and then stricken out. Surely these things do not indicate prejudice. On the contrary, they exhibit a desire on the part of the court to be fair. Erroneous rulings against a litigant, even when numerous and continuous, form no ground for a charge of bias or prejudice, especially when they are subject to review. (Estudillo v. Security Loan etc. Co., 158 Cal. 66 (109 Pac. 884); Burke v. Mayall, 10 Minn. 287; State v. Bohan, 19 Kan. 28; Stahl v. Schwartz, 67 Wash. 25 (120 Pac. 856); Bell v. Bell, 18 Idaho 636 (111 Pac. 1074); State v. Barnett, 98 S. C. 422 (82 S. E. 795).) Nor are a judge's expressions of opinion, uttered in what he conceives to be the discharge of his judicial duty, evidence of bias or prejudice. (State v. Bohan, 19 Kan. 28; State v. Crilly, 69 Kan. 802 (77 Pac. 701); Ex parte N. K. Fairbank Co., 194 Fed. 978; Epstein v. United States, 196 Fed. 354 (116 C. C. A. 174).)

"The vexation of the judge, and his remark that he did not know how the jury could possibly have reached such a verdict, does not show prejudice against Mrs. McEwen. These things indicated perhaps that he had formed an opinion regarding the legal questions which had been presented in the case and in reference to

> the sufficiency of plaintiff's proof. *Such conviction in the mind of the judge, based upon his actual observation of the witnesses, the hearing of their testimony,* and his knowledge of the law applicable to such cases does not amount to that prejudice against a litigant which the statute contemplates as a basis for change of venue. (Western Bank of Scotland v. Tallman, 15 Wis. 92, 104)."

In *Western Bank v. Tallman,* 15 Wis. 101 (cited by the California Supreme Court), the court held that the fact that the judge had formed an opinion upon the legal questions involved in the case did not show prejudice.

In *Moses v. Julian,* 84 Am. Dec. 122 (N. H.), the court, with reference to prejudice and bias on the part of a judge, said:

> "Under this head falls the class of cases where the Judge has a bias or prejudice in favor of or against one of the parties. Such bias, caused by hearing an *ex parte* statement of the facts of a case, would be a disqualification to try it. A Judge anxiously on his guard to hear nothing of the cases which may come before him except what is said in Court and in the presence of the adverse party, may yet find that he has been imposed upon by artful statements designed to create a judgment in his mind relative to the case. In such a case he may well decline to sit in the case."

In this case Judge Van Fleet had heard what is tantamount to an *ex parte* account of the transactions which are the basis of this suit, and has been influenced thereby adversely to these defendants.

In *Commonwealth v. Webster,* 59 Mass. 295, 297, the court said:

> "The word 'prejudice' in a statute making the prejudice of a juror a ground of challenge, seems to imply nearly the same thing as 'opinion' a prejudgment of the case, and not necessarily an enmity or ill will against either party. * * * It must be such an opinion upon the merits of the question as would be likely to bias or present a candid judgment upon a full hearing of the evidence."

In *Hungerford v. Cushing,* 2 Wis. 397, 405, it was said:

> "Under a statute providing for a change of venue on the ground of prejudice of the judge trying the cause, the term 'prejudice' does not mean an opinion formed beforehand upon the questions of law involved in the case, *but an opinion or judgment in regard to the case, formed beforehand without examination, or a prepossession."*

In *Hinkle v. State,* 21 S. E. 595, 600, the court said:

> "Prejudice means a prejudging of a case from any cause. It means a settled and fixed opinion, either as to the guilt or innocence of an accused, no matter from what cause that opinion is derived or upon what it is based."

In *Hudgins v. State,* 2 Ga. 173, 176, the court said:

> "Bias is that which sways the mind toward one opinion rather than another . . . One whose opinion is preconceived and expressed is inclined to that side, and some evidence is

necessary before these impressions can be removed and his mind restored to the straight line of indifference."

In *State v. Board of Education,* 52 Pac. 319, (Wash.), the court said:

"While some courts have decided that the tests of the respective qualifications of judges and jurors are not the same, yet in a case of this kind, where the judges pass upon the facts, we see no good reason why the test of qualification should be different."

In the above case the court also said:

"To compel a litigant to submit to a judge who has already confessedly prejudging him, and who is candid enough to announce his decision in advance, and insist that he will adhere to it no matter what the evidence may be, would be farcical and manifestly wrong."

In *Wharton Cr. Law,* (Sec. 2945), the author says:

"The practice among the civilians extends the right of challenge for cause to the judges as well as the jurors; and the great inclination of authority is that the same causes which disqualify one disqualify the other. Where the judge, like a chancellor, sits to try both fact and law, as in the case with the civilians, there is peculiar reason for the application to him of a jealous test."

In *Chenault v. Spencer,* 68 S. W. 128, (Ky.), the affidavit of one of the parties stated that the judge had said that affiant had no right to the land in controversy, and had criticized the decision of the

court of appeals in affiant's favor. Held, that the judge was disqualified by reason of bias and prejudice.

Section 21 of the Judicial Code was enacted in 1912. It is remedial and should be liberally construed. It received such liberal construction in the case of *Berger v. United States, supra.* All that the statute requires is that the facts stated shall reasonably support the claim of bias and prejudice.

As pointed out by Mr. Justice Reynolds in his dissenting opinion in *Berger v. United States, supra,* it is not the actual personal prejudice of the judge against the party which is contemplated by Section 21 of the Judicial Code, *but the honestly entertained belief of such prejudice on the part of the litigant when such belief is based upon fairly adequate facts and circumstances.* These defendants have this belief, and this belief is supported by the certificate of their counsel of record as required by the Statute. How can it be said the facts and circumstances stated in the affidavits do not afford a fairly adequate basis for this belief?

In California, before 1897, bias and prejudice on the part of the judge were not grounds for changing the judge, but in 1897, Section 170 of the Code of Civil Procedure was amended so as to make prejudice or bias such grounds. The California cases decided under the law as it existed before 1897, are, of course, not applicable here. Nor are the cases in many states (notably Texas) where

bias and prejudice are not recognized by statute as a ground.

In addition to the foregoing authorities, the following may be cited:

Works v. Superior Court, 130 Cal. 304;
Morehouse v. Morehouse, 136 Cal. 332;
Bassford v. Earl, 162 Cal. 115, 119;
State v. Fullerton, 183 Pac. 979 (Okla.).

The word "prejudice" is defined by *Webster's International Dictionary* as follows:

> "Prejudice—Preconceived judgment or opinion; leaning toward one side of a question from other considerations than those belonging to it; prepossession; unreasonable predilection for, or objection against, anything; esp. an opinion or leaning adverse to anything without just grounds or before sufficient knowledge."

The word is derived from the prefix "pre" and the word "judge."

"Bias" is defined by the same authority as follows:

> "Bias—a leaning of the mind; propensity or prepossession toward an object or view, not having the mind indifferent . . . prejudice."

At the hearing in the District Court, counsel for plaintiffs cited the case of

Ex parte N. K. Fairbanks Co., 194 Fed. 978, (District Court.)

The affidavit in that case was frivolous in the extreme. It did not in the slightest degree tend to

show bias or prejudice against the N. K. Fairbanks Co.

Referring to the affidavit filed, the District Judge said:

> "The only reason stated as a fact, and not alleged on information and belief, to show personal bias or prejudice between the parties, is the correspondence between the presiding judge and Judge Shelby, which is made an exhibit to the petition and refers to the application made to the Circuit Judges to designate another judge to try the case. *No reference whatever was made to the merits of the litigation, or preference expressed between the parties, or intimation of any kind given either as to the law or the facts of the case.*" (Page 991.)

In *Ex parte N. K. Fairbanks, supra,* the District Judge had written a letter to the Circuit Judge containing a very mild criticism of one of the attorneys (who was not the attorney of record) of the N. K. Fairbanks Co. In this letter, the attorney was criticized for complaining to the Circuit Judge that the case had been delayed. The attorney had filed a petition with the Circuit Judges of the Fifth Circuit, asking that a judge be assigned to try the case on the ground of the alleged delay. One of the Circuit Judges sent a copy of the petition to the District Judge, together with a letter, and it was in reply to this letter that the District Judge mildly criticized the attorney who had filed the petition with the Circuit Judges.

Counsel for plaintiffs at the hearing before Judge Van Fleet quoted the following extract from the

opinion of the District Court in the case of *Ex parte N. K. Fairbanks Co., supra*:

> "Common sense and the authorities alike teach that such expressions of opinion by a judge in the discharge of duty, concerning either the conduct of a litigant or its attorney, are not evidence of personal prejudice or bias as to either."

This statement of the court was made with reference to the mild criticism of the party's attorney.

Furthermore, the decision of the District Court in *Ex parte N. K. Fairbanks,* 194 Fed. 978, *supra,* has been overruled by the Supreme Court of the United States on nearly every point decided. The District Court in that case held that the affidavit could not be made on information or belief, and also held that if Section 21 of the Judicial Code was construed to mean that the mere filing of an affidavit, stating facts reasonably supporting the charge of bias and prejudice, required the judge to be changed, then the Section was unconstitutional. In both of these particulars the decision of the District Court was overruled by the Supreme Court in *Berger v. U. S.*, 255 U. S. 32.

At the hearing counsel for plaintiffs cited *Emporia v. Volmer,* 12 Kan. 627. Under the law of Kansas (as appears from the opinion in the case cited), it must be clearly shown that there exists a prejudice on the part of the judge against the defendant. It was not sufficient that a *prima facie* case be shown "such a case as would require the sustaining of a challenge to a juror." And under

the law of Kansas, where the application was denied, the reviewing court should sustain the trial court "on the ground that the judge must have been personally conscious of the falsity or non-existence of the grounds alleged." Obviously the case has no application to a case arising under Section 21 of the Judicial Code, as construed by the Supreme Court in *Berger v. U. S.*, 255 U. S. 32, *supra.*

At the hearing counsel for plaintiffs stated that "It further appears from the very statements disclosed by the affidavits that the court expressly says he feels that he will have to sustain the plea of *res judicata*" and that "Clearly this shows that there could be no personal prejudice or personal bias affecting a hearing on the merits."

Just how the statement of the judge quoted above in any way lessens the effect of the statements concerning the merits of the case, was not pointed out by counsel.

Counsel for plaintiffs also made the point that the other defendants have not filed affidavits under Section 21. But that fact is wholly immaterial.

In *Henry v. Speer,* 201 Fed. 869, 871, cited by plaintiffs at the hearing, a reference had been made to the master in chancery in an equity suit in which Henry was a party. In Henry's affidavit it was averred that the judge "was biased and prejudiced against deponent's (the plaintiff) right to recover." The affidavit stated that the judge had rendered an opinion "in which practically every issue was prejudged and determined by said judge." The opin-

ion was rendered in pursuance of the discharge of the official duty of the judge. The opinion itself is not printed in the report of the case in 201 Federal, but presumably it merely stated the judge's conclusions on matters of law or fact that had been submitted to him for his decision. The affidavit in the above case did not state that the judge had any personal prejudice or bias against the affiant, but merely a prejudice against the affiant's "right to recover."

Contrast that case with the case at bar. There the judge had heard a preliminary matter in the cause and in deciding that preliminary matter had rendered an opinion adverse to the plaintiff's contentions. The opinion was rendered in discharge of the official duty of the judge, and doubtless related to the matter which had been submitted to him for his decision. And if the opinion went beyond the law of the case and referred to the facts, doubtless such reference to the facts was called for by the nature of the matter that was submitted to the court for its decision. Moreover, if any reference was made to the facts, it was a reference based upon the facts as they were made to appear to the court in the action in which the opinion was filed. In that case the judge had never come in contact with the litigant outside of the case. But in the case at bar the statements made by the judge had no reference to the plea of *res judicata,* which had been submitted to him for his decision. Nor were the statements based upon any evidence which had been introduced in the pending cause but were based on

evidence introduced in a cause in which these defendants were strangers. They were based on a contact with these defendants outside of the case. Moreover, the statements made in this case show an extremely strong feeling on the part of the judge that these defendants have been guilty of gross fraud in the very matters which are the basis of the bill of complaint.

In plaintiffs' points and authorities filed at the hearing before Judge Van Fleet, it was said that

> "a judge's expressions of opinion, uttered in which he conceives to be the discharge of his judicial duty, are not evidence of bias or prejudice,"

and in support of this statement the case of *State v. Bohan,* 19 Kan. 28, and other cases are cited. In that case *State v. Bohan,* the judge, at the conclusion of the trial of a criminal case, and a verdict of guilty by the jury, expressed himself as believing in the defendant's guilt. As pointed out in the first part of this brief the statements made by the judge were made in the ordinary course of judicial procedure, and were based on the jury's verdict of guilty.

A case where, after hearing the evidence, the judge criticizes the conduct of a party, is in no respect similar to a case where a party's conduct is harshly criticized before any evidence is received and where the criticism is based upon a contact with the party wholly outside of the case. Furthermore, it is respectfully submitted, in no sense can the statements quoted in the affidavits on file be

deemed to have been made in the discharge of the judicial duty of the judge.

It may be noted that the statements of Judge Landis under consideration in *Berger v. U. S., supra,* were actually made in the discharge of his judicial duty in the case where the statements were made. They were made in sentencing a person who had been convicted of violating the Espionage Act.

Epstein v. U. S., 196 Fed. 354, cited by plaintiffs at the hearing, has no relation to Section 21 of the Judicial Code, but involved a claim that the judge was concerned in interest in the prosecution or had been of counsel for the prosecution.

In *State v. Crilly,* 69 Kan. 802, cited by plaintiffs at the hearing, the judge merely stated that he intended to see that the laws regulating the liquor traffic were enforced and that in the event that persons charged with the violation of such laws were found guilty, he would see that the sentences imposed by the court were enforced. Referring to this statement, the Supreme Court of Kansas said:

> "It is apparent that what the judge said with regard to his action to be taken in the future was based upon the contingency that the defendants, in the event of their conviction, should seek to evade the effect of the judgment of the court by the artifice described. It indicates no personal bias against the defendant, but a purpose that the efficacy of any sentence that might be pronounced should not be defeated by sub-

> terfuge. At least, it does not so clearly show a prejudice as to require a reversal."

Moreover, as shown by the case of *Emporia v. Volmer,* 12 Kan. 627, *supra,* the Kansas statute bore an entirely different construction from that placed upon Section 21 by the United States Supreme Court.

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2. THE CAUSE SHOWN BY APPELLANTS AS TO WHY THE AFFIDAVITS WERE NOT FILED BEFORE MARCH 16, 1922, IS SUFFICIENT UNDER SECTION 21 OF THE JUDICIAL CODE.

In denying the applications of the appellants for the designation of another judge the court in its opinion said that the affidavits were not filed in time.

Section 21 of the Judicial Code requires that the affidavit

> "shall be filed not less than ten days before the beginning of the term of the court, or good cause shall be shown for the failure to file within such time."

In this case the affidavits were filed less than ten days before the beginning of the term of the court, but it is respectfully submitted, good cause was shown for the failure to file within the time specified in Section 21.

The statements made by Judge Van Fleet were made on January 24th *after the trial had begun.* They were made after the submission of pleas of

res judicata made by these defendants and the other defendants in the case. The affidavits were filed on March 16th. The cause shown for the filing at this time is as follows:

> "That the reasons why this affidavit was not filed not less than ten days before the beginning of the term of the above entitled court are as follows: that affiant did not at any time prior to the 24th day of January, 1922, know that said Honorable William C. Van Fleet had a personal prejudice or bias against affiant or a personal prejudice or bias in favor of said plaintiff Norvena Lincker; that on said 24th day of January, 1922, the said Honorable William C. Van Fleet ordered that the trial of the above entitled action or suit be continued indefinitely until said Honorable William C. Van Fleet had an opportunity to determine the sufficiency of said pleas of former adjudications, and at the time of making said order, said Honorable William C. Van Fleet stated that he would try no cases at San Francisco until after the month of March as he would be engaged during the month of March in trying cases at the City of Sacramento; that the official stenographic reporter who took down the said statements of said Honorable William C. Van Fleet, as aforesaid, was not the regular stenographic reporter of said court, but was merely acting as such reporter on the 24th day of January, 1922, in the place of the regular stenographic reporter; that the stenographic reporter who took down said statements in shorthand as aforesaid is named W. L. Flannery and is regularly employed as a stenographic reporter by the Railroad Commission of the State of California; that after the 24th day of January, 1922, Alfred J. Harwood, affiant's counsel herein, made diligent effort to communicate

with said W. L. Flannery and on several occasions called at the office of the said Railroad Commission to see said W. L. Flannery so that he could request said W. L. Flannery to transcribe his notes taken on the said 24th day of January, 1922, but affiant's said counsel was unable to make such request of said W. L. Flannery for the reason that said W. L. Flannery was at Eureka and other places in the State of California, acting as official stenographic reporter for the said Railroad Commission at hearings held at Eureka and said other places; that affiant's said counsel used reasonable diligence in making such request of said W. L. Flannery and used reasonable diligence in obtaining a transcript of the notes of said W. L. Flannery made on the 24th day of January, 1922, as aforesaid; that affiant's said counsel was unable to obtain a transcript of said notes until the last week in the month of February, 1922; that on the said 24th day of January, 1922, said Honorable William C. Van Fleet did not continue the trial of the above entitled action or suit to any definite day or term of said court, but continued the trial thereof indefinitely; that the time for the trial of said action or suit has not yet been set." (Affidavit of R. McColgan, Tr. pgs. 162-163.)

None of the foregoing averments is denied in the counter affidavit on file, and it is merely averred therein that the court adversely ruled on defendants' pleas of *res judicata* before the affidavits were filed. (Affidavit of F. V. Lineker, Tr. pg. 170.)

But the fact of this adverse decision on the plea of *res judicata* pending the time the appellants were preparing their affidavits does not in any way show

that the appellants were not diligent in preparing and filing the affidavits.

The purpose of the provision requiring the affidavit to be filed not less than ten days before the beginning of the term of the the court *is to prevent delay in the trial of the case. This was so held by the Supreme Court in Berger v. United States, supra.* In view of the indefinite continuance of the trial of the case no harm resulted or could have resulted from the delay. The affidavits were filed in March and the judge had stated, in indefinitely postponing the trial of the cause, that he would try no cases at San Francisco until after March. Even if there had been no other good reason for the delay the fact of the indefinite continuance of the trial would be sufficient excuse.

Where, as here, it is shown that the delay in filing the affidavit could not have delayed the trial, it necessarily follows that the delay was immaterial.

It must be conceded that these defendants and their counsel had a reasonable time after January 24th within which to consider the advisability of filing affidavits of bias and prejudice and within which to obtain from the stenographic reporter a transcript of the statements made by the judge, and within which to consider the effect of the statements, and within which to prepare the affidavits. The affidavits allege that counsel for these defendants used reasonable diligence in obtaining the transcript of the notes of the stenographic reporter and the facts showing the reason for the delay are fully set forth

in the affidavits. None of these averments is denied. It follows, therefore, that the affidavits are filed in time, unless the showing made by the affidavits is insufficient, when taken in conjunction with the further fact that the judge had set aside the submission of the pleas of *res judicata* before the affidavits were filed.

But, it is respectfully submitted, the fact of such ruling does not militate against the showing made by these defendants. The mere fact that the ruling was made while counsel for these defendants was using reasonable diligence in the matter, cannot be controlling.

It must be borne in mind that Section 21 is remedial and is to be "liberally construed so as to promote the object of the legislature by suppressing the mischief and advancing the remedy". (36 *Cyc.* p. 1174, title "Statutes".) Congress deemed that it was not just that an action should be tried by a judge who was biased or prejudiced against one of the parties. It is respectfully submitted that in construing Section 21, the court should hold that an affidavit showing bias and prejudice is filed in time unless the contrary clearly appears.

It is contended by counsel for plaintiffs at the hearing of these motions before Judge Van Fleet, that when the statements were made by the judge on January 24th, counsel for these defendants should have objected or excepted, and it has also been suggested that at such time, counsel for these

defendants should have stated that it was his intention to file affidavits of bias and prejudice.

But, it is respectfully submitted, why was counsel called upon to decide so important a matter without having time for reflection and an opportunity to read carefully the statements made by the judge? In this case, counsel for these defendants called several times on the stenographic reporter who took down the notes on January 24th, in order to request that these notes be transcribed, but due to the absence of the stenographic reporter from San Francisco, counsel was unable to obtain a transcript of these notes until the last week in February. On January 24th the trial of the cause had been continued indefinitely and the judge had stated that he would try no cases in San Francisco in March. Surely, after obtaining the transcript counsel was entitled to a reasonable time to consider it and to prepare the affidavits. In view of the indefinite continuance and the statement of the judge that no cases would be tried in March, there was no occasion for haste in the filing of the affidavits.

It has been suggested in the counter affidavit filed by Fred V. Lineker, that counsel waited until the court ruled on the plea of *res judicata* and that if a ruling favorable to these defendants had been made, the affidavits would not have been filed.

But the showing made in the affidavits negatives any such intent. It is there alleged that

> "after the 24th day of January, 1922, affiant's counsel herein made diligent effort to communicate with said W. L. Flannery so that he

> could request said W. L. Flannery to transcribe his notes taken on the said 24th day of January".

It is further averred that affiant's counsel succeeded in obtaining such notes in the last week of February. All of this negatives the idea that the matter was being delayed until after a ruling.

In this case counsel did not, as did counsel in the *Berger* case, prepare an affidavit containing an incorrect or distorted statement of the remarks of the trial judge, but care was taken to obtain from the official reporter a *verbatim* report. *And the delay in filing the affidavits was due to the delay in obtaining this verbatim report.*

Furthermore, it is respectfully submitted, even if the affidavits had stated that their filing was delayed pending a ruling on the pleas of *res judicata* they would not on that account be filed beyond the time allowed by law. The matter submitted to the court on January 24th was a question of law, and the submission was made prior to the statements showing bias and prejudice. For all practical purposes it was similar to the submission of a demurrer. Let us assume that upon the demurrer to the bill of complaint the judge has expressed himself as he did on January 24th. In such a case, would these defendants have lost the right to file an affidavit of bias and prejudice merely because they waited for the court to rule on the demurrer? The statute does not bear such a construction. If it did, a litigant (if he knew of the facts showing bias or prejudice)

could not wait until the cause was at issue on the facts, but would be obliged to file his affidavit forthwith.

The pleas of *res judicata* had been submitted to the judge before he made the statements set out in the affidavits. These pleas raised questions of law and these defendants could not have prevented the court's deciding such questions of law.

A ruling on a preliminary question of law, such as is raised by a plea in abatement, can work no substantial injury to a party against whom the judge is prejudiced. What the party in such case has the right to fear is a ruling by the Chancellor on questions of fact submitted on conflicting evidence.

Assuming, for the sake of argument, that these defendants had purposely waited for a ruling on the pleas of *res judicata* before filing the affidavits, it may be asked, what harm could have been done thereby? If the ruling had sustained the pleas, the affidavits would not have been filed as there would be no necessity to file them, for in that case the judge would not be called upon to find upon the issues of fact raised by the bill of complaint and the answer of these defendants. In such event, the bias and prejudice would be immaterial. This would not be a case where the defendants voluntarily submitted the plea to the decision of the court, after knowledge of the facts which it is claimed show bias or prejudice, but would be a case where the plea was submitted before such knowledge was acquired. The filing of an affidavit

of bias and prejudice is an unpleasant duty for counsel to perform and if he should delay filing such affidavit, with the hope that a ruling may make its filing unnecessary, his clients should not lose their rights thereby, unless some injury has resulted from the delay.

I have examined the *Century Digest,* including the latest annuals, to find some authority which would be applicable here, but have been unable to find that a situation at all similar has arisen in any adjudicated case. There are a number of cases which hold that a party, *with knowledge of the facts upon which the claim of disqualification is based,* cannot invoke the jurisdiction of the court to pass on a motion or other preliminary matter in the cause and after an adverse ruling file an affidavit of bias and prejudice. *Johnson v. Bowling,* 205 S. W. 927, 930, is such a case. In that case the defendants received knowledge of the facts on February 24th. On March 24th they demurred to the jurisdiction of the court. Three months after the court had decided adversely to defendants the question of jurisdiction, and four months after defendants obtained knowledge of the facts, the affidavit alleging disqualification was filed. In that case the defendant, with knowledge of the facts, had voluntarily made and submitted a plea to the court, and after this plea was decided adversely to him, he filed an affidavit setting up that the judge was disqualified. No excuse was offered for the delay in filing the affi-

davit. Obviously, the above case does not present a situation like that which is now presented to this court.

In *State v. Superior Court,* 180 Pac. 481 (Wash.), it was held that the filing of a motion to make the complaint more definite and certain after knowledge of the facts on which the claim of bias and prejudice was based, did not preclude the party making the motion from subsequently filing an affidavit of bias and prejudice. In so ruling the court said:

> "They (the relators) are objecting only to the right of the respondent as a person to pass upon the merits of the case."

In the above case the court also said that the statute "is a remedial statute and must be liberally construed".

In Re Equitable Trust Co. of New York, 232 Fed. 836 (C. C. A.), illustrates the rule that a party should not be permitted to make a motion in a pending suit and while the motion is pending undetermined file an affidavit of bias and prejudice less than ten days after the beginning of the term. In that case the District Court had ruled that the affidavit was not filed in time, and that it did not state facts showing bias or prejudice. The Circuit Court of Appeals (on petition for writ of mandamus) refused to pass upon these questions, but denied the petition for a writ of mandamus on the ground that the petitioner's motion that the judge proceed

with the entry of a decree was still pending before him and that

> "the action of the trial Judge thus set in motion and continuously prosecuted before him by the petitioner itself cannot, we think, be thus paralyzed".

State v. Morgan, 77 So. 592, is also an example of a case where the party by submitting a question to the decision of the court with knowledge of the facts, is held to be precluded from afterwards making objection. In that case the court said:

> "In this case it appears that the defendant had submitted a preliminary plea to the Judge for decision on the same morning when he filed his motion for recusation; and the Judge had ruled on the plea when the motion for recusation was filed. *The defendant did not in his motion for recusation allege that he came to the belief that the Judge was prejudiced against him after he had submitted the preliminary issues to the Judge for decision."*

Although the matter is not involved here, it does not seem that, under Section 21, a party by making preliminary motions and taking other proceedings, prior to the term of the court in which the case is to be tried on the merits, waives his right to file an affidavit of bias and prejudice. It would seem that he could file such affidavit within ten days prior to the beginning of the term in which the case is to be tried, wholly irrespective of his having submitted demurrers and other preliminary motions and pleas to the judge. Under the statutes in many states,

however, the submission of such preliminary pleas with knowledge of the facts on which the alleged bias or prejudice is based is deemed a waiver of the right to object to the judge's trying the case.

It is respectfully submitted, that no authority will be found to support the contention that the affidavits of these defendants were not filed in time. All the cases where it has been held that the affidavits were not filed in time involved facts essentially different from those existing in this case.

The situation here is very different from a case where, during the progress of the trial of a cause on the merits, a party received knowledge of facts showing that the judge was biased and prejudiced against him and with the knowledge of such facts submitted the cause to the judge for his decision, and, after an adverse decision, filed an affidavit of bias and prejudice. There are a large number of cases of this kind, where it has been held that the affidavits of bias and prejudice were filed too late.

This is clearly a case where the defendants had the right to file their affidavits after January 24th, when the statements were made by the judge. I maintain that there was never presented to a court affidavits which more clearly show bias and prejudice than those on file in this case. Assuming that the affidavits show bias and prejudice, they must be given the effect provided for by statute, unless it clearly appears that they were not filed in time. And, it is respectfully submitted, they must be

deemed to have been filed in time unless there was unreasonable delay in filing them.

Assuming that the affidavits show bias and prejudice entitling these defendants to the remedy provided for by Section 21 of the Judicial Code, then the objection here is, in effect, that the defendants have waived the right to ask for that remedy. In 23 *Cyc.* 597, title "Judges", the author says:

> "The right to object on account of prejudice is waived by making a motion in the cause."

The waiver of a legal right will never be presumed and a party will not be held to have waived a legal right unless his acts, which it is claimed constitute the waiver, are unequivocal. Waivers are not favored in the law. (40 *Cyc.,* title "Waiver".)

The pleas of *res judicata* had been submitted to the court before the statements were made by the judge. This is not a case where a litigant submits a plea or motion with the knowledge of the facts showing bias or prejudice. These defendants, after the submission of the pleas, were in no position to ask the court not to rule thereon because of the statements made by the judge after the submission. They had the right to obtain a transcript of the statements made by the judge and, upon obtaining this transcript, their counsel had time to consider the effect of the statements and to prepare the affidavits. All that could be reasonably required of these defendants is that they should file their

affidavits before the trial was resumed or any further question submitted to the court for its decision. Under the circumstances here shown, it should be held, it is respectfully submitted, that the showing as to the cause of the delay is entirely sufficient under Section 21 of the Judicial Code.

In this case the affidavit is clearly sufficient under Section 21 of the *Judicial Code.* When such an affidavit is filed less than ten days before the beginning of the term and cause is shown therein for the delay in filing, it could not have been the intention of the statute that the judge should have any discretion in regard to designating another judge, provided the cause shown for the delay was *prima facie* sufficient. If the statute were otherwise construed the very purpose for which it was enacted would be subverted. (*Vide* opinion of the Supreme Court in the *Berger* case.) Under such circumstances the judge should not pass on questions of fact which might be raised by a counter affidavit but should confine himself to deciding whether or not, as a matter of law, the cause shown is sufficient. However, in this case the counter affidavit did not deny any of the material averments of the affidavits of appellants, or any of the averments showing cause for filing the affidavits at the time they were filed but merely averred that before the affidavits were filed the court had decided adversely to appellants on their plea of *res judicata.*

In his opinion filed at the time of the making of the order appealed from, Judge Van Fleet made certain statements which are not based upon the record. In the foregoing part of this brief I have fully set forth the showing made by appellants as to the reason the affidavits were not filed until March 16th and also the fact set out in the affidavit of the plaintiff, Fred V. Lineker, that before the affidavits were filed the court had ruled adversely on the plea of *res judicata*. These were the only matters which were before the court at the hearing. But in his opinion Judge Van Fleet makes the statement that in 1919 at the trial of the action at law of *Lineker v. Dillon,* he "gave voice to expressions substantially similar to those complained of here, both of the McColgans being in court at the time". This statement is not based upon any evidence presented to Judge Van Fleet at the hearing by affidavits or otherwise, and is directly at variance with the record which shows that these appellants did not know of the personal bias or prejudice of Judge Van Fleet until January 24, 1922, when the statements set out in the affidavits were made. (Affidavit of R. McColgan, Tr. pg. 162; Affidavit of Adelaide McColgan, Tr. pg. 149.)

The proceedings at the time the affidavits were read are set forth in the Transcript at pages 176-181.

Even if the record had shown (which it does not) that Judge Van Fleet made the same statements in 1919 that he made on January 24, 1922, that fact

would not show that the affidavits were not filed in time. In the first place all of the statements showing bias and prejudice set out in the affidavits herein could not in the nature of things have been made in 1919. Some of the most significant statements made by Judge Van Fleet on January 24, 1922, were the following:

> "That the evidence they have given in the past in Courts of Justice under certain circumstances does not change my attitude at all, because in the case of *Lineker v. Dillon* the entire facts of this entire transaction were developed to me in such a way as to leave no room for doubt as to the conclusion that should be based upon them; and, therefore, I desire, if possible, to reach the merits of this controversy * * *. Therefore, I say, that if I can get away from this technical objection (the plea of *res judicata*)—techinical in the sense that it does not involve the merits—I shall do so * * *. I will continue the case on the merits until I have been able to examine those questions, with the hope, as I say, that I may be able to avoid the defense, but with the fear that I shall not be able to do so." (Affidavit of Adelaide McColgan, Tr. pp. 144-146.)

Even if these defendants had known that Judge Van Fleet had harshly criticized them in 1919, in the case of *Lineker v. Dillon,* those statements could not have been coupled with the statements quoted above which show that the bias or prejudice on the part of Judge Van Fleet was so strong that the judgments in favor of the defendants rendered in the state courts, one of which was affirmed by the

District Court of Appeal (*Lineker v. McColgan,* 36 Cal. App. Dec. 559), "did not change his attitude at all" and that he hoped to be able to overrule the pleas of *res judicata* in order that he could try the issues as to the alleged fraud. Nothing that Judge Van Fleet could have said in 1919, before this suit was begun, could have given these defendants ground for the belief that he had prejudged this suit, and had made up his mind, in advance of hearing their side of the case, to render judgment against them.

Moreover, even if Daniel A. McColgan in 1919 had heard Judge Van Fleet criticize him as severely as he did on January 24, 1922, the administratrix of his estate, who has been substituted in his place as a party, would not be charged with the knowledge of Daniel A. McColgan as to such statements. When the administratrix learned for the first time on January 24, 1922, that the judge was biased and prejudiced, she had the undoubted right to the remedy provided by Section 21 of the Judicial Code. Undoubtedly as to property rights an administratrix is bound by the acts and knowledge of the decedent, but with reference to the conduct of a case in court she has the same right to the remedy provided by Section 21 as she would have to any other right conferred by law upon a party litigant. The fact that the decedent may have known that the judge was biased and prejudiced against him could not prevent the administratrix from objecting when *she* became aware of the bias and prejudice.

As shown above, the statement made by Judge Van Fleet in his opinion to the effect that in the case of *Lineker v. Dillon,* in 1919 he made statements regarding the McColgans substantially similar to those made by him on January 24, 1922, is wholly unsupported by the record in this case. If substantially similar statements were made, the plaintiffs in their counter affidavit should have so averred, but the counter affidavit is silent on the subject.

Since Judge Van Fleet made his order refusing to designate another judge I have obtained a copy of the official reporter's transcript of the testimony given in the case of *Lineker v. Dillon,* and have carefully read it to ascertain what was said by Judge Van Fleet at the trial of the case of *Lineker v. Dillon.* In that case while Daniel A. McColgan was on the witness stand Judge Van Fleet merely stated to him that he had no right in the world to claim the title to the property covered by the deed of trust by purchasing in the certificate (a sheriff's certificate of sale) because he was obliged under the trust deed to protect the title. The District Court of Appeal in *Lineker v. McColgan,* 36 Cal. App. Dec. 559, held that nothing in the deed of trust prevented Mr. McColgan from purchasing the adverse title. This statement by Judge Van Fleet showed no bias or prejudice, but was merely a statement of his view of the law. There is no statement here that the transaction "was a stench in the nostrils of any

honest man" or that it "was little less than downright robbery". Nor is there any statement that underlying the declaration of Mr. McColgan that he felt there was something coming to Mrs. Lineker "was this history of a state of facts that should make any honest man blush".

The court erred in permitting the counter-affidavit of the plaintiff, Fred V. Lineker, to be read. These defendants objected to the reading of this affidavit and the objection was based on the decision of the Supreme Court in *Berger v. United States,* 255 U. S. 32 *supra.* (Tr. pg. 179.)

The only part of this affidavit which was any way material was the part which averred that the pleas of *res judicata* had been decided by the court before the date of the filing of the affidavits averring bias and prejudice.

It is respectfully submitted that the judgment of the District Court should be reversed and the cause remanded with instructions to the presiding judge to designate another judge for the trial of the cause.

Dated, San Francisco,
February 10, 1923.

Alfred J. Harwood,
Attorney for Appellants.